IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

CIVIL APPLICATION NO.987 OF 2004
IN
APPEAL FROM ORDER NO.643 OF 2004
IN
NOTICE OF MOTION NO.1962 OF 2004
IN
SHORT CAUSE SUIT NO.2406 OF 2004

1. Smt.Barkubai Akar Patil & Ors. ... Applicants

V/s.

1. M/s.Ravi Foundation & Ors. ... Respondents

Mr.P.K. Samdhani with H.S.S. Murthy for Appellants
Mr.Rajiv Narula for Respondents

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **DECEMBER 21, 2004**

P.C.:

. The appeal was admitted on 5.8.2004. On 25.8.2004, it appears that the parties have agreed that the appeal may be disposed off finally as arguments for interim relief would be the same as at the final hearing of the appeal. However, since the appeal could not be taken up for hearing, the present Civil Application has been filed and orders are sought on the Civil Application.

2. This Civil Application has been filed for certain interim reliefs. Prayer clauses (a) and (b) are as under:

a) that pending the hearing and final disposal of Appeal, this Hon'ble Court be pleased to restrain the Respondents or any person claiming through them with the order of injunction from putting up any construction on the plot of land being Survey No.149, CTS No.1A or any part thereof;

b) that pending the hearing and final disposal of Appeal, this Hon'ble Court be pleased to restrain the Respondents or any person claiming through them from entering or remaining therein or putting up any construction or dealing with in respect of the property beyond the 5 acres i.e., beyond the are of 20234.35 sq.mtrs. of Survey No.149, Hissa No.A-1/2, CTS No.1A, i.e., in the are of 2.5 acres of land situated at Village Bunderpakhadi, Kandivali (West), Mumbai-400067;

3. A few facts which are relevant for deciding the Civil Application are that one Akar Shaniwar Patil, the predecessor-in-title of the appellants, acquired five acres of land leased to him by the Government. It appears that he was also in possession of an additional 2.6 acres of land since 1952. On 2.7.1981, a development agreement was entered into between Appellants and the Respondents for developing the property held by him. The area described in the agreement is stated to be five acres. The Possession letter dated 10.2.1984 also mentions the area as five acres that is 20275 sq.metres. Akar died in 1986 leaving behind six heirs, the appellants herein. The six heirs agreed to grant development rights in respect

of their undivided shares of part of the property held i.e., 5 acres i.e., 20275 sq.mtrs. by agreement dated 5.4.1993. On the same date, a power of attorney was executed by the appellants in favour of the respondents. The power of attorney mentions the land admeasuring 40000 sq.metres. It appears that after these agreements were entered into, several claimants had filed suits against the appellants as well as the respondent-developer. Consent terms were entered into between the Appellants and the Respondents and the heirs of the brother of Akar on 21.4.1993 in the suit in Bombay City Civil Court. These consent terms also mention the area as 20234.35 sq.metres. It appears that after the development rights were given to Respondent No.1 the Collector regularised the lease and entitlement of the deceased Akar with respect to the balance area of 2.6 acres equivalent to 9717 sq.mtres.

4. According to the appellants, the developer has encroached on this land admeasuring 2.6 acres, despite the development agreement restricting the development to 5 acres. The appellants have filed the present suit seeking an injunction against the developer from encroaching upon the 2.6 acres of land. The appellants were refused interim relief and hence, this Civil Application.

5. Heard advocates.

6. Considering the various submissions made by the parties, what would be relevant is to ascertain whether the appellants had agreed that an area beyond 5 acres of land should be developed. Under the power of attorney given to the developer the entire area of 40000 sq.mtrs was mentioned whereas the development agreements mentioned a lesser area, equivalent to 5 acres.

7. In my view, the power of attorney cannot be read in isolation. It must be read in juxtaposition with the development agreements which stipulate the area as five acres or thereabout, although the revenue records show an additional area. This additional area is hardly about 400 sq.mtrs. Obviously, therefore, the area reflected in the development agreement will be the one which is to be considered, prima facie, as the area on which the appellants had agreed that the developer could develop the property. Reliance is placed on the judgment of this Court in the case of *Barses J.A.D'souza v/s. Municipal Corporation of Brihan Mumbai,* **2003(4) ALL MR 594.** This judgment indicates that a power of attorney holder merely acts as an agent of the principal and it only confers an authority on the agent to represent and act on behalf of, and often in the name

of, the principal in the matters covered by the power of attorney. It is open to the principal to do all the things which he has authorised his agent or attorney to do and such an agency agreement can always be revoked. Therefore, the submission that the power of attorney will override the agreements for development cannot be accepted, prima facie.

8. It is submitted on behalf of the appellants that when there is a conflict or discrepancy between the description of the property in the recitals of the agreement and the schedule to the agreement it is the schedule which has to be considered. Reliance is placed on the judgment of the Privy Council in the case of *The Palestine Kupat Am Bank Co-operative Society Ltd. v/s. Government of Palestine & Ors.*, **AIR (35) 1948 Privy Council 207** and of the Supreme Court in the case of *Sheodhyan Singh & Ors. v/s. Mst.Sanichara Kuer & Ors.*, **AIR 1963 1879 (V 50 C 267)**. These were cases of misdescription and therefore, may not be applicable on all fours to the facts before me. This will have to be examined at the hearing of the appeal.

9. Prima facie, it appears there is no contradiction at all in the schedule and recitals to the agreements for development. It is only in the power of attorney which is sought to be relied on that the area

of the land mentioned is larger. Even the earlier consent terms entered into between the brother of Akar on one hand and the appellants and the developer on the other hand indicate that what was agreed to be developed was five acres and not more. Therefore, prima facie, it appears that the development agreement was only restricted to five acres and the Respondents would be entitled to develop only that part of the land. However, there is no dispute that the respondents have paid an amount of Rs.3.74 crores for securing release of the entire land including 2.6 acres. The Appellants would have to bear the proportionate cost. In my view, the following order would meet the ends of justice as an interim measure, pending the hearing of the appeal:

i) The Respondents may develop only 5 acres of the suit property which is equivalent to 20234.35 sq.mtrs.

ii) The Appellants/Applicants will deposit an amount of Rs.1 crore in Court within 12 weeks from today.

10. Civil Application is disposed of as aforesaid.